U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

Date:March 24, 1999
Case No.: **1996 INA 256**

In the Matter of:

WESTSIDE NURSING SERVICE, Employer,

on behalf of

JERRY BLEZA, Alien.

Certifying Officer: R. M. Day, Region IX.
Appearance : D. E. Korenberg, Encino, California, for the Employer and Alien.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application filed on behalf of JERRY BLEZA, (Alien) by WESTSIDE NURSING SERVICE (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On November 16, 1993, the Employer applied for Alien Labor Certification to permit her to employ the Alien on a permanent basis as an "Accountant" to perform the following duties in its Nursing Registry:[2]

> Direct implementation of a general accounting system for keeping accounts and records of disbursements, expenses, tax payments, assets and income collection into the general ledgers. Prepare monthly profit and loss statements and balance sheets to reflect company's assets, liabilities and capital. Maintain payroll records. Responsible for timely and accurate filing of quarterly and annual tax returns and tax-related papers; Perform internal auditing of company financial records and prepare schedules and reports. Assist management in formulating and update of budget, and perform comparison with actual figures and variance analysis. Responsible for updating/ maintaining accounts receivables and payables and for making payments to suppliers and collections from debtors.

AF 40 (Quotation without change or correction.) The Employer's education and occupational requirements were a baccalaureate degree in accounting plus two years in the Job Offered or in

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[2] The position was classified under DOT Occupation No. 160.162-018, **ACCOUNTANT** (profess. & kin.) Applies principles of accounting to analyze financial information and prepare financial reports: Compiles and analyzes financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions. Analyzes financial information detailing assets, liabilities, and capital, and prepares balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position, using calculator or computer. Audits contracts, orders, and vouchers, and prepares reports to substantiate individual transactions prior to settlement. May establish, modify, document, and coordinate implementation of accounting and accounting control procedures. May devise and implement manual or computer-based system for general accounting. May direct and coordinate activities of other accountants and clerical workers performing accounting and bookkeeping tasks. *GOE: 11.06.01 STRENGTH: S GED: R5 M5 L3 SVP: 8 DLU:88*

the Related Occupation of Accounting Clerk.[3] The Other Special requirements were, "Must be experienced in the use of Lotus 123, Word Perfect, and 10 key by touch." *Id*.[4] Although eight U. S. workers applied for the position, all of them were rejected by the Employer. AF 39.

Notice of Findings. On February 15, 1995, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted.[5] The NOF cited 20 CFR §§ 656.21(b)(6), 656.21(j)(1)(iii) and (iv), and 656.24(b)(2)(ii) in finding that the Employer failed to establish that U. S. workers who applied for the position were not qualified and available to perform this job. (1) The NOF said there was no evidence that the Alien had passed the Employer's test of occupational skills before the Employer hired him in 1993. Noting that failure to pass the test was the basis for employer's rejection of Barata and Manasarian, the NOF observed that the use of the test was invalid because Employer did not disclose how much time it gave the job applicants to complete the test, it failed to provide an answer key to permit the CO to verify the correctness of the answers Employer assumed in using the test, and there was no evidence of record that the applicants tested failed to show their qualification by other means. Finally, Mr. Manasarian said Employer failed to interview him for the job. AF 36. (2) As the applications and resumes of Inge and Soliman showed combinations of education, training, and/or experience sufficient to enable them to perform the usual duties required in this occupation as it customarily is performed by other U. S. workers similarly employed, the Employer was directed to show the specific lawful and job-related reasons for having rejected. (3) Noting passing a skills a test was not a hiring criterion in the Employer's application for alien labor certification, the

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[3] We held in **Francis Kellogg, et als.**, 94 INA 465, 94 INA 544, and 95 INA 068 (Feb. 2, 1998) (*en banc*) that where the alien does not meet the primary job requirements but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, as in this case, the employer's alternative requirements are unlawfully tailored to the alien's qualifications in violation of 20 CFR § 656.21(b)(5) unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, this employer's alternative requirements are unlawfully tailored to the alien's qualifications in violation of 20 CFR § 656.21(b)(5).

[4] The Alien is a National of the Philippines, who was born 1969. He was living and working in the United States under an H-1 visa at the time of application. After earning a baccalaureate degree in accounting in 1990, he attended a community college for three months in Wilmington, Delaware, where he was awarded an Associate Degree in accounting in 1991. From 1986 to 1989 the Alien worked as an accounting clerk in a gas station in the Philippines, where he performed duties comparable to those described in Employer's Application. For three months in 1991 he worked as a computer operator at the community college where he earned the associate's degree in accounting mentioned above. From 1993 to the date of application, the Alien worked for the Employer in the Job Offered. AF 112-113.

[5] The NOF first found that the position was not offered subject to Employer's minimum requirements under 20 CFR § 656.21(b)(5), as its education and experience requirements of a baccalaureate degree in accounting and two years of experience did not appear to meet employer's true minimum requirements. The reason, said the NOF, was that the Alien did not meet those requirements at the time he was hired by the Employer, which later gave him the necessary training and learning opportunities after he became employed in the Job Offered. The Employer correctly pointed out in the rebuttal that this finding was not supported by the evidence of record and offered persuasive evidence supporting its representations. AF 31, 32. As this issue was not pursued by the CO or mentioned in the Final Determination, it will not be discussed.

NOF required Employer to show that Barata and Manasarian were not qualified for the job, based on the requirements stated in its application as filed. (4) As the Employer did not attempt to contact qualified applicants Giri and Lai until five weeks after the state agency sent the Employer their resumes, and it did not attempt to contact Alonzo and Iman until nearly three weeks after the state agency sent their resumes to the Employer, the NOF directed the Employer to provide evidence of timely attempts to contact and interview each of these U. S. workers. AF 36, 37, 38.

Rebuttal. On June 14, 1995, the Employer filed a rebuttal which included a letter by Employer's counsel, which the owner of the Employer signed to indicate her agreement with its representations. The rebuttal also included (1) an affidavit by counsel's employee, who recounted that she requested the Employer to forward the resumes of three unnamed job applicants that the state agency had sent to the Employer on May 18, 1994; (2) a copy of counsel's letter to the CO, dated March 20, 1995, which the owner of the Employer signed to indicate her agreement with its representations;[6] (3) Employer's letter dated May 6, 1994, advising the state agency of the addition of a skills test and purportedly enclosing the key to the test questions, which was appended to the letter; (4) a copy of the Alien's resume and an affidavit offering further information about his work history.

Final Determination. On August 18, 1995, the CO denied certification, finding that the Employer had failed to sustain its burden of proof. AF 10-11. (1) Noting the evidence that the Employer gave notice of a skills test in the advertisement published on May 10, 11, and 12, 1994, the CO said Employer's recruiting advertisement put applicants on notice that they would only be tested on their ability to operated a ten key adding machine and use Lotus 1-2-3 and WordPerfect software. While the phrase "job duties" appeared in other contexts, it did not appear in the recruiting advertisement. As the workers applying were not given notice that this was a test of their capacity to perform all of the duties of this position, the results confirmed that they were unprepared to respond to the questions Employer posed. (2) The resume of the applicant, Soliman, indicated that his work experience addressed the major elements of the job duties. Because of Employer's failure to interview him to determine his ability to perform the job, its reasons for rejecting him were neither lawful nor job-related, as they addressed only the titles of positions he held and not the content of the work he performed. (3) Employer failed to submit the documentation required to answer the questions of fact posed in the NOF. (4) Counsel's failure to notify the state agency of the absence of some of the referred resumes and Employer's failure to produce proof of its efforts to telephone some of the job applicants indicated the absence of a good faith effort to recruit U. S. workers seeking this position. AF 11. The CO then denied certification.

Employer's appeal. On September 19, 1995, the Employer applied for BALCA review of the denial of certification. AF 01. The Employer filed a brief supporting the appeal, which has been considered in arriving at the conclusions of the Panel.

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[6] The letter recapitulated the Employer's position as to various issues and explained the Alien's qualifications as of the date it was sent to reply to the original NOF.

DISCUSSION

Burden of proof. The factual findings of the CO will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). Moreover, in all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification.[7] The imposition of the burden of proof is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[8]

Analysis and conclusion. Unless the form of the evidence is specified by the regulations or by the NOF, "written assertions which are reasonably specific and indicate their sources or basis shall be considered documentation." **Gencorp**, 87 INA 659 (Jan. 13, 1988). In this case, however, the Employer's assertions have been found insufficient to carry her burden of proof. **Alfa Travel**, 95 INA 163 (Mar. 4, 1997).

Skills test. passing a skills test was listed as a condition for hiring in the Employer's application for alien labor certification, Employer was required to show that the amendment to Form ETA 750A to incorporate a skills test as a hiring criterion did not result in unfair treatment to the U. S. workers who applied for this job. In responding to the NOF finding that insufficient notice of the skills test was given to the U. S. job applicants the Employer replied that its advertisement gave adequate notice of the test. Employer's brief argued:

> However, the ad specifically stated: "TEST GIVEN TO VERIFY ABILITY TO PERFORM (job duties) & USE 10 KEY BY TOUCH, LOTUS 123 AND WORDPERFECT."

AF 03. This is not factual, as the Employer's tearsheet copies of the recruiting advertisement did

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[7] Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

[8] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

not contain the phrase "(job duties)" that its appellate brief quoted. AF 100-102. Examination of these tearsheets clearly contradicts Employer's rebuttal contention that an applicant could understand that a test of skills would be given by reading what its recruiting advertisement.

Taking a different tack at another point, the Employer's brief tacitly acknowledged the omission of adequate notice from its recruiting advertisement, but said it considered this to have been corrected in its contact letter, which said, "A test will be given at the time of interview in order to test your abilities to perform the duties of the position and utilize the required computer software/programs and 10 key by touch." As this test became the primary criterion on which the Employer relied in rejecting the U. S. applicants, all aspects of its administration and the implementation of its results were relevant to the NOF examination of its credibility. In spite of the request of the NOF, the Employer's rebuttal failed disclose how much time it gave the job applicants to complete the test, to provide copies of the tests and the answer key to permit the CO to verify the correctness of the answers Employer assumed in using the test, and to supply evidence that the applicants tested had failed to show their qualification by other means. For these reasons, the CO was not persuaded that Employer's administration of this skills test was fair or that the test was implemented in good faith. Notwithstanding the line that the Employer inserted at the end of the contact letter it later sent the job applicants, the CO found that the admittedly misleading notice of the test content in the recruiting advertisement had the effect of placing U. S. applicants at a disadvantage in competing for the Job Offered, in which the Alien was already working for the Employer.[9] **Loma Linda Foods, Inc.**, 89 INA 289 (Nov. 26, 1991)(*en banc)*.

Good faith recruiting. While the regulations do not explicitly state a requirement that employers exercise good faith in carrying out the recruiting process, the legislative purpose of testing the labor market to implement the Act implies the expectation that good faith will characterize all aspects of this proceeding under 20 CFR § 656.1. **H. C. LaMarche Enterprises, Inc.**, 87 INA 607 (Oct. 27, 1988)(*en banc*). Where a U. S. applicant is apparently qualified for the position and where, as in this case, employer engages in behavior that amounts to the virtual rejection of the U.S. applicant, it may reasonably be found that the employer's behavior has violated 20 CFR § 656.21(b)(7). **Lakewood Manor Apartments**, 88 INA 572 (Oct. 18, 1989). Consequently, we agree that the CO's denial of labor certification was based on persuasive evidence of record in this case. **Naegle Associates, Inc.**, 88 INA 504 (May 23, 1990). For this reason we conclude that the Employer has failed to establish that there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor within the meaning of § 212(a)(5) of the Act. As the evidence supported the CO's denial of alien labor certification, the following order will enter.

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[9] The Employer's reiterated reliance on **A to Z Vending Service Corp.**, 91 INA 014 (Jan. 29, 1993), and other cases is not persuasive, as those decisions did not address defect in the instant case, that Employer's description of the content and purpose of the test mentioned in its recruiting advertisements misled the job applicants, based on the inferences drawn by the CO.

ORDER

The denial of alien labor certification by Certifying Officer is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: **1996 INA 256**
WESTSIDE NURSING SERVICE, Employer,
JERRY BLEZA, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: February 8, 1999